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No. 87-1712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOES 1-4,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY MEMORANDUM

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The United States in its brief in opposition to the petition for a writ of certiorari urges this Court to endorse the *per se* rule announced by the court below that a federal grand jury's demand for evidence always takes priority over the competing imperatives of civil litigation. It argues that a protective order carefully fashioned by one district court judge to protect deposition testimony that never would have been given but for the existence of the protective order may always be ignored or overridden by a district judge in another district in the interest of criminal law enforcement. Finally, in an effort to persuade this Court that there is no conflict between the decision below and decisions of the Second Circuit, the government misreads or mischaracterizes directly conflicting Second Circuit cases that articulate a reasoned, practical balancing approach to the competing needs of civil litigation and federal law enforcement.

ARGUMENT

1. The government's argument is predicated on the preeminence of the grand jury and the importance of criminal law enforcement, the acknowledged concept that the Fifth Amendment sometimes imposes hard but not unconstitutional choices on those who may wish to assert it, the

related notion that those who fail to assert the Fifth Amendment privilege may find themselves having waived it for other purposes or in other contexts,[1] and the fact that its invocation by parties in civil cases may lead to adverse inferences being drawn against them. All of this misses the point.

The issue in this case is whether a federal district court judge, in an effort to manage his civil litigation docket and to permit the parties in litigation before him to depose relevant witnesses before trial, has the power and authority to issue a protective order shielding certain deposition transcripts from disclosure, and whether the witnesses whom he seeks to protect may rely on the order of the court in deciding whether to testify. If this Court concludes that there is no such power or authority where criminal law enforcement is involved or that the grand jury's subpoena power always takes precedence over civil protective orders, future witnesses who know that a grand jury may be investigating matters relating to the civil litigation will not rely on such protective orders and simply will refuse to testify. If that is the law, in the future neither the parties to the civil litigation nor the grand jury will have the benefit of the deposition testimony because it will not exist.

2. In related arguments, the government contends that the holding below "does not threaten to impede civil litigation" because there exist other more effective "judicial management tools" (Reply at 8), and that the protective order entered here could not properly be relied upon by petitioners "as an absolute protection against disclosure of information" because even under the Second Circuit's "compelling need" test there is always the possibility that the order will be modified. Reply at 6.

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[1] The government overstates the law on this point. *See, e.g., In re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *In re Beery*, 680 F2d. 705, 720 n.7 (10th Cir.), *cert. denied*, 459 U.S. 1037 (1982); *United States* v. *Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *Carter-Wallace, Inc.* v. *Hartz Mountain Industries*, 553 F. Supp. 45, 50 (S.D.N.Y. 1982).

The facts of this case provide the answer to the government's argument. At the time they were subpoenaed to testify as witnesses in September 1986, petitioners knew that a grand jury had been convened in Baltimore to investigate the events leading up to the failure of Community Savings and Loan and its EPIC group of subsidiaries but they did not know the scope of the investigation and had not been advised of their status before the grand jury and the prosecutors. Concerned about the grand jury investigation but lacking sufficient information to make tactical judgments, aware of the atmosphere in Maryland in the wake of the savings and loan crisis and the public attention paid to it, and knowing that with the passage of time their course would become clearer, petitioners moved for a stay of their depositions. The district court, however, denied the motion for stay and proposed a protective order instead, concluding that the litigants in the civil case had a right to complete discovery and move their case forward to trial rather than await the uncertain timing of the outcome of the grand jury investigation, an investigation that is still not completed even now, 20 months after entry of the protective order.

The government's glib suggestion (Reply at 8) that the court should not have entered a protective order but instead a stay or some other of available "judicial management tools" necessarily would mean that the related civil litigation involved here, or at least important depositions, would still be stayed awaiting action by the government. The decision whether to grant a stay in such circumstances or to choose some other method is properly a matter of discretion for the trial judge, who must generally apply a balancing test in considering the interests of the parties and witnesses. Had one of the "judicial management tools" recommended by the government been used by the district court here, it is likely that neither the civil litigation nor the criminal investigation would have made much progress. As a practical matter in the present world of increasing numbers of parallel civil, criminal and administrative proceedings all growing out of the same events and transactions, it is unrealistic to

suggest, as the government does (Reply at 8), that the decision below and the traditional salutary purposes of Rule 26(c) protective orders can coexist.

As for the level of protection provided by the protective order, petitioners always knew it was limited but they relied on the terms of the order, which expressly provided for modification by the issuing court or any other court having jurisdiction over the trial of the civil cases, and on the good faith and understanding of the judge who had entered it. In agreeing to the terms of the order, petitioners assumed the risk that modification could occur in the future. They did not, however, assume the risk that the modification could be imposed unilaterally by another district court without any deference to the court that entered the order in the first place. The proper procedure for the government was to ask the court that entered the protective order to modify it and to demonstrate on the particular facts the "compelling needs" of criminal law enforcement to override the concerns for the just, speedy and efficient resolution of the civil dispute which initially gave rise to the protective order.[2]

3. The government argues that there is no conflict between the decision below and decisions of the Second

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[2] Contrary to the government's argument, the protective order does not constitute a judicial grant of immunity. Reply at 7. The government is free to prosecute petitioners based on the information it gathers with the powerful tools available to it and the grand jury, and it is free to intervene in the civil case and request modification of the order upon a suitable showing to the court that entered the order. The government, however, cannot transform the civil protective order into a grant of immunity simply by choosing to ignore the order and its modification provisions whenever it is convenient to do so.

Nor is it proper for the government, of all litigants, to place two co-equal district court judges in conflict with each other by prevailing upon one, in the name of criminal law enforcement, to ignore or overrule the order of the other. Contrary to the government's assertion (Reply at 7-8 n.4), requiring it to seek modification of the protective order from the court that entered it is consistent with notions of comity and proper judicial administration and in no way impinges on the prerogatives of the grand jury. *United States* v. *Davis*, 702 F.2d 418, 423 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *see Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 225-226, 228-231 (1979); *cf. Illinois* v. *Abbott & Associates*, 460 U.S. 557, 573 (1983).

Circuit, contending that the Second Circuit has applied the "compelling need" standard only where "an informal demand" for information is made by the government (Reply at 11) and has expressly or "implicitly" declined to apply it where the government seeks enforcement of "a formal demand for materials" governed by a protective order. Reply at 10. According to the government, in the Second Circuit it is the "nature" of the government demand and the "method" it uses that are crucial. Reply at 11 n.7.[3] The government argues that a more formal demand indicates a greater degree of governmental interest, and when there is a formal demand no showing of "compelling need" is required. Reply at 10-12.[4] This analytical predicate for the conclusion that there is no conflict in the circuits is ingenious, convoluted and wrong.

In *United States* v. *GAF Corp.*, 596 F.2d 10 (2d Cir. 1979), GAF Corporation was the plaintiff in civil litigation against Eastman Kodak, which also was a target of an antitrust investigation. GAF obtained documents from Kodak in discovery in the civil litigation. Then the Antitrust Division sought the Eastman Kodak documents through a civil investigative demand served on GAF. Because corporate documents were involved no Fifth Amendment privilege existed and none could be asserted either in the civil case or in response to the CID. Furthermore, as the court noted on rehearing in *GAF*, the documents sought by the CID, which

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[3] Under the government's view, because *United States* v. *GAF Corp.*, 596 F.2d 10 (2d Cir. 1979) and *United States* v. *Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983), involved "formal" demands, the Second Circuit did not require a showing of "compelling need"; because *Martindell* v. *ITT*, 594 F.2d 291 (2d Cir. 1979), *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985) and *Minpeco* v. *Conticommodity Services*, 832 F.2d 739 (2d Cir. 1987), involved "informal" requests, a showing of "compelling need" was required.

[4] Parenthetically we note that there is something anomalous in a formulation that requires a showing of "compelling need" when the government has shown a "lesser degree of interest" in the information and no showing at all when the governmental interest is great enough to justify use of its most awesome investigative tool, the grand jury. In such case it hardly seems appropriate for it also to exploit the fruits of civil litigation without some showing of need.

were not privileged, would have been directly available to the government by subpoena, and its ruling upholding the CID merely conserved judicial resources without creating any additional or overreaching powers for the government. *United States* v. *GAF Corp.*, 596 F.2d at 19.[5] Significantly, *GAF*—which the government chastises petitioners for failing to cite (Reply at 11, n.6)—did not involve any attempt by the government to obtain witness *testimony* by using formal governmental process to obtain transcripts of depositions taken in the civil litigation, the very question at issue here.

The distinction, then, is between the nature of the material sought, not the nature of the government demand. This was made clear by the Second Circuit in *Martindell* v. *ITT*, 594 F.2d 291 (2d Cir. 1979), decided five days after its *GAF* decision:

> However, we are not called upon in the present case to decide whether the Government might be entitled to enforcement of a subpoena compelling production of the depositions. Moreover, although the Government, in *GAF* and *Zenith*, may have been seeking merely to short circuit statutory procedure in the interest of saving time and money, here it would be, under its own argument, creating a discovery power it does not presently possess.

Martindell v. *ITT*, 594 F.2d at 296 n.6.

The court in *Martindell* went on to recognize the importance of reliance by the private party on the terms of the protective order and stated that such reliance is much greater with respect to testimony of "a witness who would, absent the protective order, have invoked his privilege and given no testimony at all" than it is with respect to preexisting documents. *Martindell* v. *ITT*, 594 F.2d at 297 n.8.

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[5] The court suggested in *GAF* that any documents sought by the CID subject to an outstanding protective order might be obtained by the government's seeking modification of the protective order and expressly stated that an application for modification should be made "to the judge who is in control of the private litigation in which it is still pending." *United States* v. *GAF Corp.*, 596 F.2d at 16. *See id.* at 19 (on rehearing).

Furthermore, on rehearing in *GAF* the Second Circuit specifically distinguished *GAF* from *Martindell:*

> The *ITT* panel did not deal with a CID authorized by a statute. . . . what was sought by the Government in ITT was the *deposition testimony* of witnesses on a matter delicate enough to have counselled the invoking of a claim of constitutional privilege against self-incrimination, which claim of privilege was foregone on an explicit agreement between the parties sanctioned by protective order for limited use of that testimony.

United States v. *GAF Corp.*, 596 F.2d at 18 (emphasis in original).

Thus, the distinction between *GAF* and *Martindell* is not between formal process and informal request but the nature of the material sought to be protected. In the case of corporate documents, there was no need for a showing of compelling need because they were not even arguably protected by the Fifth Amendment. In the case of witness testimony that would not even have existed but for the civil litigation and a protective order entered by the judge in the civil case, the government was entitled to it only on a showing of compelling need. The same is true here. But for the protective order in this case, there would have been no deposition transcripts for the grand jury to subpoena.

The government also argues that the Second Circuit applied the "compelling need" standard in its recent decision in *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985), only because *Palmieri* involved an "informal demand" for information and thus demonstrated a lesser degree of governmental interest. Reply at 11-12 n.7. The facts of *Palmieri* fail to prove the government's point. It is true that the government in *Palmieri* initially sought to intervene in the civil proceeding in order to vacate the protective order, but while that motion was pending it issued a grand jury subpoena *ad testificandum* to a party to the protective order. After litigation concerning the subpoena, the government was enjoined from questioning the witnesses in the grand jury on any matter relating to the matters subject to the protective order pending resolution of the motion to quash.

Palmieri v. *New York*, 779 F.2d at 864. Thus, in *Palmieri* the government attempted to obtain the protected materials both by seeking to modify the protective order and by issuing a grand jury subpoena. In that situation the Second Circuit required a showing of compelling need. *Cf. Minpeco* v. *Conticommodity Services*, 832 F.2d (2d Cir. 1987).

Finally, the government attempts to rely upon *United States* v. *Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983), for its position that the Second Circuit's "compelling need" standard does not apply where the demand for information is by formal process. Reply at 13. There a federal grand jury through subpoena obtained documents and deposition transcripts that had been filed under an unwritten understanding of confidentiality. The Second Circuit in *Davis* recognized the appropriateness of balancing the needs of the civil and criminal justice systems and acknowledged the "compelling need" formulation used in *Martindell*. It had no occasion to apply the standard on the facts of the case before it, however, because there was no protective order entered by the district court and no reliance even on the unwritten "understanding" of confidentiality among counsel. Indeed, the lack of reliance was the most crucial factor cited by the court in *Davis*. 702 F.2d at 422. *Davis* simply did not involve the issue in this case, where a federal judge issued a written protective order because of Fifth Amendment concerns, petitioners clearly relied on its terms in determining how to proceed at their depositions and the government chose to ignore the court's order, relying instead on the assumed preeminence of the grand jury and the importance of criminal law enforcement.

CONCLUSION

For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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